



The Only dUmb Question is the One You Don't Ask: How to Prepare for Cross Examination in Youth Court Cases

Presented by:

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**Remember
to Think
globally!**





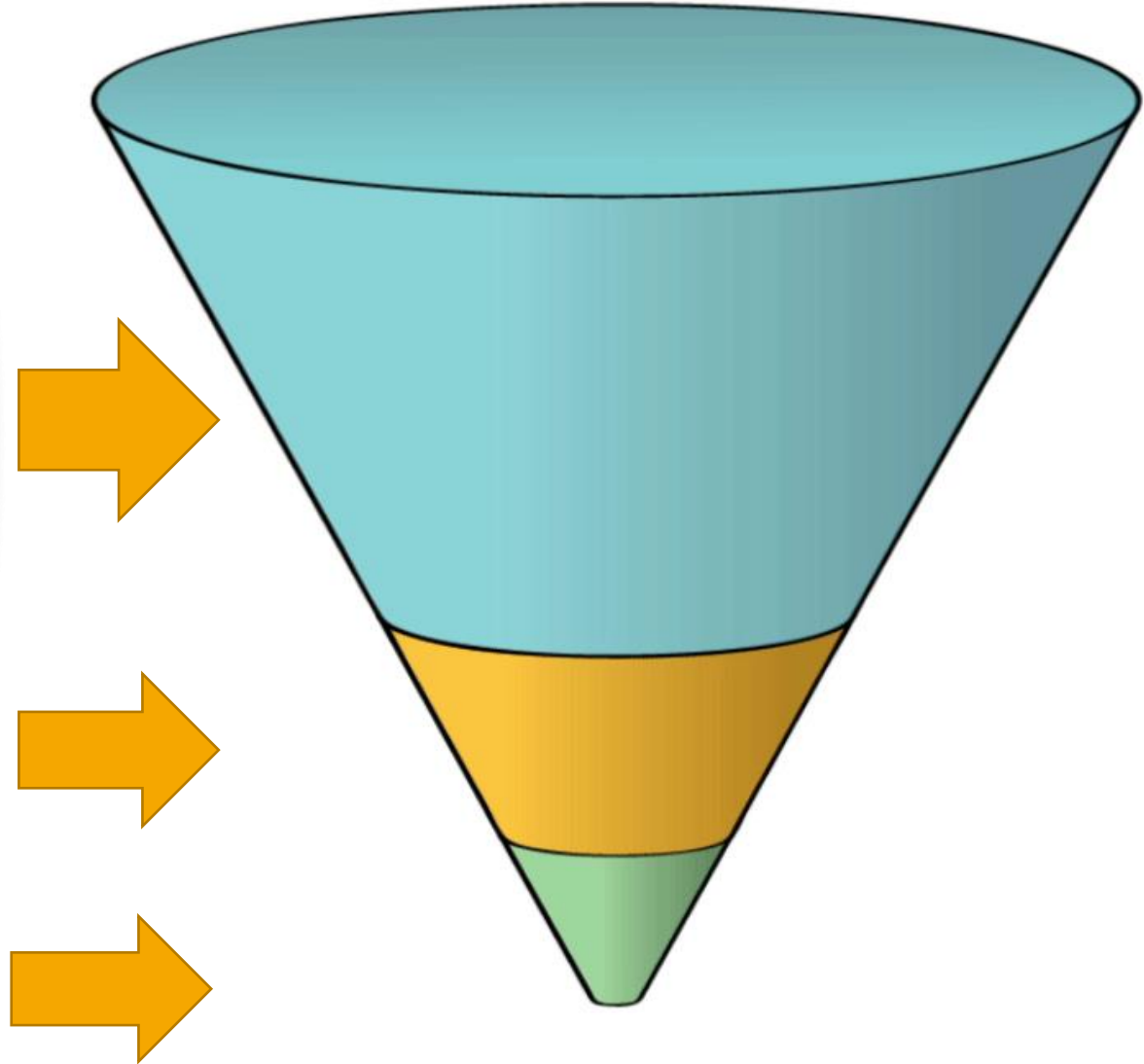
Outline

- Law governing cross examination
- Deciding the content for cross examination
- Conducting cross examination
- Use of documents/exhibits for impeachment/refreshing
- Common tips for common witnesses

**Ensuring and protecting the
right to cross examine
witnesses.**

**Preparing and organizing
your cross examination.**

Cross examination tips.



Law Protecting Your Right to Cross Examine Witnesses

- Confrontation Clause of the Sixth Amendment (applied through the Fourteenth Amendment) has long been read as securing an adequate opportunity to cross-examine adverse witnesses. *See United States v. Owens*, 484 U.S. 554, 557 (1988) (dicta); *see e.g., Lee v. Illinois*, 476 U.S. 530, 539-43 (1986); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). *See also Crawford v. Washington*, 541 U.S. 36, 61 (2004).
- The right to confront and cross-examine witnesses has also been held to be essential to due process and a fair trial within the provisions of the Fourteenth Amendment. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973); *In Re Oliver*, 333 U.S. 257 (1948).
- Miss. R. Evid. 611 (b) – Scope of Cross Examination: The Court may **not** limit cross-examination to the **subject matter of the direct examination** and matters **affecting witness's credibility**.

Law Protecting Your Right to Cross Examine Witnesses

- Bias is essentially any motive or reason why a witness would have to misrepresent the truth.
- “Bias is a term used in the ‘common law of evidence’ to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor or against a party. Bias may be induced by a witness’s like, dislike or fear of a party, or by the witness’s self-interest. Proof of bias is almost always relevant because the jury or judge has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’s testimony.” *United States v. Abel*, 469 U.S. 45, 52 (1984).
- Miss. R. Evid. 616 – Witness Bias – **evidence of a witness’s bias**, prejudice or interest-for or against any party – is admissible to attack the witness’s credibility.

Content of Cross

Purpose

- Advance the defense theory of the case by eliciting certain facts from witnesses.
- Persuade the fact-finder to adopt the defense's theory of the case.
- Weaken the value of the witness's testimony.
- Create or expose conflicts with the testimony of other prosecution witnesses.
- Cause the prosecution to decide not to call other anticipated witnesses (e.g., because they are afraid of further conflicts).

Content of Cross

Goals

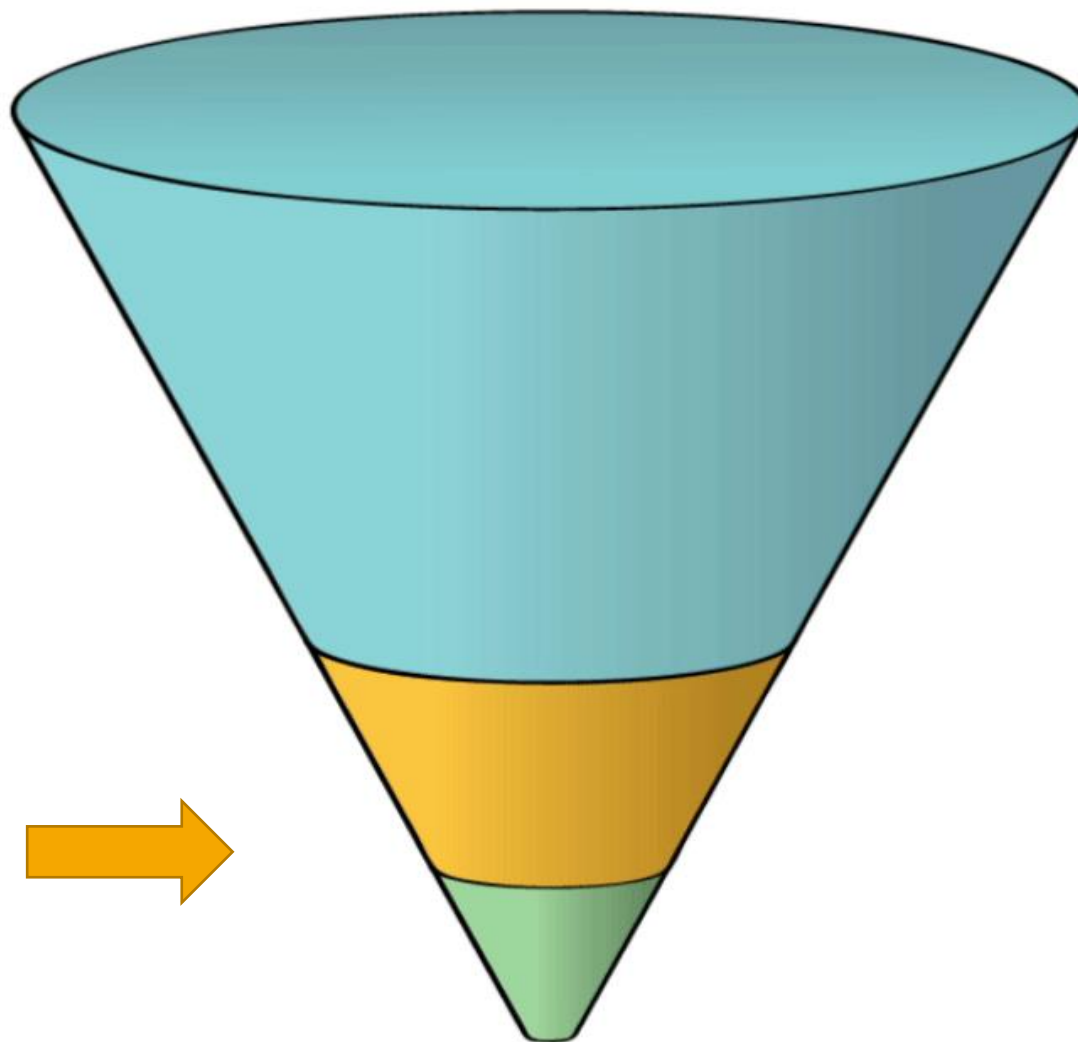
- **Elicit facts from the prosecution's witnesses** that are **necessary to convince the fact-finder** of the defense theory of the case.
- Elicit facts that **refute the prosecution's theory**.
- Elicit contextual facts that show how much of the evidence the defense theory can cover.
 - Address **bad** facts.
- Elicit facts that will **help the defender develop an emotionally compelling and persuasive closing**.

Peripheral Goals:

- The defender **may develop a rapport** with the fact-finder through cross-examination.
- The defender **can demonstrate command of the case** during the witness's examination.



**Preparing and organizing
your cross examination.**



Preparation

- Investigation
 - Effective cross-examination requires thorough investigation. Even if the defender is not able to interview every witness, he or she can find out a lot of relevant and useful fodder for cross.
- Anticipate cross
 - Based on investigation and/or discovery.
 - Keep a catalog of all the witnesses have said.
- Have a strategy for each witness
 - Lying witness vs. confused witness
- Listen!
 - Adapt questions based on what was heard on direct.
 - Allow witness to answer question before asking another one.

Theory of the Case/Theory of the Witness

- Book/Chapter/Page
 - Book – theory of the case
 - Chapter – themes/sub-theories for each witness
 - Page – specific lines of questions in each chapter for the witness
 - Think of what facts you want to elicit from each witness
 - Once you've determined the headings, determine what order you want to address each topic in.
 - Start and end strong.

Theory of the Case/Theory of the Witness

Book/Chapter/Page Example

- Book: Self-Defense
 - Chapter: Witness has motive to lie since he or she was the initial aggressor
 - Page
 - Witness has a history of aggression.
 - Witness has threatened the client in the past.
 - Witness owns a weapon.
 - Witness has a history of false accusations.

Common Areas of Cross for All Witnesses

- Perception and poor opportunity to observe
- Poor recollection
- Inability to relate the story
- Witness's story defies common sense, physics, geography
- Witness's story is contradicted or defies the witness's own actions
- Bias
- Prior inconsistent statements
- Prior bad acts, prior convictions or bad character
- Violation of the oath to tell the truth

General Topics for Goal Headings

- No opportunity to observe (especially important in ID cases)
 - Sub-headings could be: **happened at night; witness was tired; lighting was poor; there were obstructions to the witness's view** (e.g., cars, trees, houses, bushes).
- Timelines (timing between/surrounding other events)
- Emotional state of witness (e.g., scared, hysterical) (how it affected the witness's opportunity to observe)
- Witness was distracted
- Descriptions
 - If the witness gave descriptions to officers before trial, the defender may want the witness to describe the suspects he or she saw to compare them to what he or she initially told police for possible impeachment.

General Topics for Goal Headings

- Identification Procedure
 - Sub-headings could be: **poor opportunity to observe; police made suggestive or coercive comments; time between event and ID was long; etc.**
- Evidence found/not found
- Bias

Final Note About Identifying Goals for Cross

- Poorly defined goals are over broad and imprecise
 - To show the witness is lying
 - To make the witness look bad
- Well-defined goals
 - To elicit the witness's prior inconsistent statements to show that he or she is lying
 - To show the witness is lying by showing that he or she has lied in court before
 - To show the witness could not have seen the robber because he or she was not even on the block at the time of the robbery (e.g., witness said that she was on her way to see Spiderman at 3 p.m. but the Spiderman movie wasn't playing at 3 p.m.)

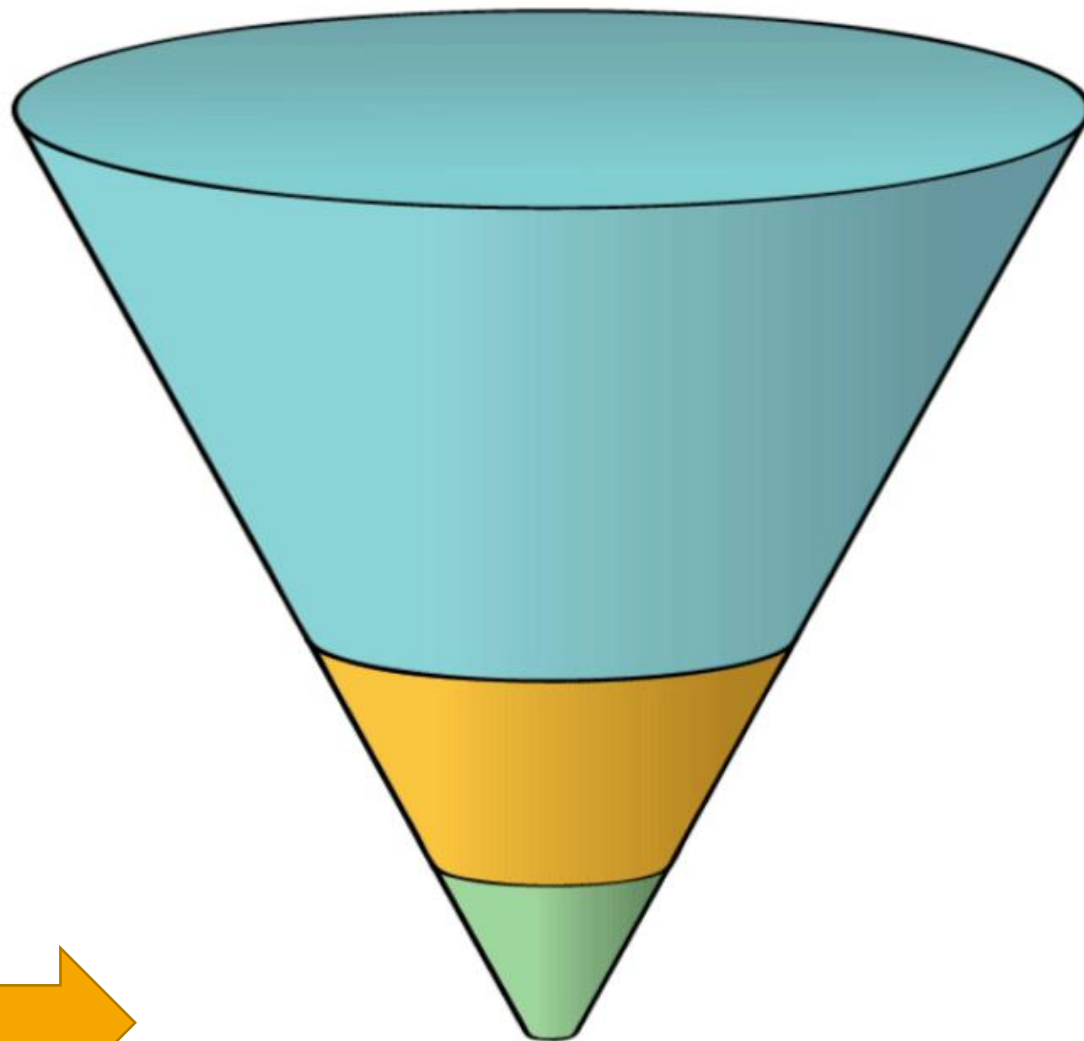
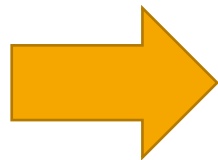
Cross Examination Organization Tips

- Start strong and end strong! (Primacy/recency)
- **Ask easy and more general questions first.** Get the witness to give you what he or she has to give early in the examination, and then proceed to the more difficult points. This technique is designed to initially **disarm the witness, who is unlikely to admit harmful facts** early in questioning.
- Aim or guide the witness where you want him or her to go, if possible, **by asking questions that likely appear to the witness to be for one purpose, but may serve another purpose.**
- **Avoid chronology so the witness cannot anticipate questions.** Instead, move from highlight (goal) to highlight (goal), guided by the theory of the case.
- **Use few transitions** so as to **not signal where he or she is going.**
- **Organize questions thematically** so the judge knows where the defender is going (even when the witness does not).
- **Organize questions persuasively** (e.g., demonstrating that the police officer is a liar and that the fact-finder cannot believe anything he or she says).
- **Think strategically about the order and tone of questioning.** For example, the defender may start questioning friendly but then **turn on the witness to emphasize critical facts.**

Cross Examination Organization Tips

- Stipulation of facts
 - May be useful for the defender **to request a stipulation of facts in lieu of a prosecution witness's testimony at trial or at an evidentiary hearing.**
 - The goal is to simplify and expedite trials by **eliminating the need to prove uncontested factual issues.**
 - Stipulations may be to the **copies or originals of documents, or to agree to the qualifications of a witness.**
 - The attorneys may also make an **agreement concerning the testimony an absent witness** would give if he or she were present. **The stipulation of facts would be used as evidence at trial or during the motions hearing.**

Cross examination tips.



Five Commandments of Cross-Examination

Commandment #1: Ask Leading Questions.

- A question that ASSERTS the answer.
- Declarative sentences, NOT questions: leading questions are not questions at all, but are declarative sentences that become interrogative at the end.
 - Example: You like to drink, (declarative) don't you (interrogative)?
 - As you establish a rhythm, you can leave off the interrogative.
- No leading question ever starts with: who, what, when, where, how or why.
- Leading questions should NOT start with VERBS; they should begin with the subject of the sentence: NOUNS.
 - Verbs (Explain, tell, describe) are reserved for direct.

Five Commandments of Cross-Examination

Commandment #2: One Fact Per Question. Keep it short!

- Short questions get short answers.
- Short questions create the rhythm the defender wants.
- Short questions help the defender keep organized.
- Short questions demonstrate control over the witness.
- Short questions pinpoint exactly where the source of the disagreement is, if the witness does not agree.

Five Commandments of Cross-Examination

Commandment #3: Use Simple Language and Avoid Quibble Words

- **AVOID ADJECTIVES:** Adjectives are subjective and therefore may leave you and the witness in disagreement.
 - Ex. “It was dark outside.”
- Instead, ask one fact, simple questions that get to the same point.
 - Ex. This incident happened in April. It was after 8:00p.m. The sun had set. There was little lighting in the parking lot. It was dark.

Five Commandments of Cross-Examination

Commandment #4: Never Ask the Ultimate Question

Ex. So, officer, you didn't have a good opportunity to observe the suspect, did you (?)

 So, officer, you really couldn't see what the suspect looked like (?)

Five Commandments of Cross-Examination

Commandment #5: Listen to What the Witness Says

- The defender should adapt the plan to what the witness says on direct and in response to cross-examination questions.
- Silence is Golden!! Don't be afraid to take a moment to think before speaking.
- Looping –don't forget looping!

Courtroom Presence

- The defender should walk or move with a purpose while cross-examining the witness. This movement should be intentional.
- **Watch the Audience:** The **defender should be cognizant of how his or her presence, tone or inflection is affecting the fact-finder or audience.** The fact-finder's reactions may cause the defender to change his or her presence – either to make the audience more or less comfortable. This is a strategic decision.

Use of Documents/Exhibits for Impeachment

- Admitting a Prior Inconsistent Statement
 - Laying the Foundation
 - The defender must lay the foundation before impeaching a witness with a prior inconsistent statement.
 - To lay the foundation, the defender must direct the witness's attention to the prior statement by establishing:
 - The time it was made;
 - The location it was made;
 - The circumstances of how it was made; and
 - That the prior statement was in fact made by the witness.
 - Miss. R. Evid. 613 provide that the witness must be given an opportunity to explain the inconsistency in statements.

Use of Documents/Exhibits for Impeachment

Admitting the Impeaching Document

- An impeaching document is admissible if there is an inconsistent portion of the prior statement after defense counsel has laid the foundation. See *Gordon v. United States*, 344 U.S. 414, 420-21 (1953).
- The defender should know how to properly enter evidence for any impeachment that requires the introduction of a document or exhibit.
- M.O.P.S.
 - **M**ark, show **O**pposing counsel, **P**ermission to approach, **S**how witness.

Use of Documents/Exhibits for Refreshing Recollection

The defender can refresh when:

- The witness knows the facts, but can't remember them on the stand; and
- The witness believes a document, or another item, will refresh his or her memory.
- **Anything** can be used to refresh the witness's recollection. The defender may refresh the witness's recollection with **an object, a picture, a document or even certain movement**, so long as the defender believes that it will refresh the witness's memory.

Common Tips for Common Witnesses

Police Witnesses

- Cross-examination should be very specific and produce short factual answers.
- The defender **should rarely, if ever, ask, “What attracted your attention to the client?”** because the question may elicit the officer’s experience with the youth’s prior criminal acts or other damaging testimony.
- As a general rule, the defender **should not ask why a police officer did something.** He or she should elicit **only what the police officer did**, as specifically as possible.
- Police officers are professional witnesses and consequently can be very difficult to cross. As with most witnesses, it is **best to begin with “agreeable” questions to get the officer in the rhythm of saying “yes,” and then get to the more difficult questions.** It is very important that the lawyer use the specific words from a police report so that the officer has to say yes. **Oftentimes, attempts at paraphrasing end in disaster and result in a loss of control of the witness.**

Common Tips for Common Witnesses

Snitches (accomplices)

- The defender should demonstrate that the accomplice has some motive for fabricating.
 - Bias
 - Consideration from the prosecution for testifying
- The defender should bring out the accomplice's **prior criminal record** or **bad character for truthfulness**.
- The defender should reveal the **inconsistent testimony** the accomplice is telling.
- The defender should elicit from the accomplice **charges that have been filed against him or her, charges that have been dropped or reduced**, or at least **discussions of the dropping or reduction of his or her charges**.
- The defender should be **wary** of revealing the accomplice's past relationship with the client if they **know each other primarily through the commission of crimes**.
- If the accomplice lies, the prosecution is constitutionally bound to reveal the truth or face reversal of a conviction after the truth comes to light. *Napue v. Illinois*, 360 U.S. 264 (1959)

Common Tips for Common Witnesses

Identification Witnesses

The defender should focus on the ability to properly identify the assailant by bringing out:

- a. Speed of the transaction
- b. Bad lighting
- c. Obstructions to vision
- d. Fear witness was feeling at the time
- e. Lack of opportunity to observe
- Elicit facts to show that the witness didn't know your client and has not seen your client since.
- Note discrepancies of client at trial vs. how witnesses describe them.

Common Tips for Common Witnesses

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- Note discrepancies of client at trial vs. how witnesses describe them.
- Cross-racial identifications (if applicable)

Common Tips for Common Witnesses

Alleged victim (complainant) in sex cases

- The defender should adopt a gentler approach.
- The defender should be aware that the fact-finder is likely to feel sympathy for the complainant and operate accordingly.
- In cases in which the defense is misidentification, the defender should cross-examine the witness on the factors that prevented a good look at the assailant.
- The defender should speak with the prosecution's serology expert and possibly retain a defense expert in order to show inconsistencies in or limit the impact of the prosecution's serology evidence.
- In cases in which the defense is fabrication, the defender will have to establish that the complainant bears a severe enough bias or grudge against the client to motivate the charge.
- In cases in which the defense is consent, the defender should stress any objective manifestations of consent.

Common Tips for Common Witnesses

Youth complainant or witness

- The defender should use gentle methods and a considerate tone to win the confidence of the youth.
- If the youth's testimony appears rehearsed, the defender should bring out the extent of the prosecution's pre-trial discussions with the youth.
- If the youth's testimony appears vague, the defender should highlight the youth's inability to appreciate the significance of the whole matter.



Next Steps

- Re-join your group from yesterday.
- Prepare a cross examination for either of the prosecutor's witnesses: police officer or store clerk.

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